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Supreme Court, U.S.
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No. 02-168

In The

Supreme Court of the United States

DUDLEY LUKE FOUSSELL,

Petitioner,

v.

PARKER DRILLING OFFSHORE, USA, LLC, THE MERIDIAN RESOURCES CORPORATION, and C & F OFFSHORE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT C & F OFFSHORE SERVICES, INCORPORATED

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QUESTION PRESENTED

Is a conflict between the United States Circuit Courts of Appeals raised by the facts of the underlying case?

RULE 29.6 STATEMENT

Parties to the Proceeding and Statement Pursuant to Rule 29.6.

Pursuant to R. 29.6, Respondent declares there is no parent or publicly held company owning 10% or more of the corporation stock.

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BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, C & F Offshore Services, Incorporated ("C & F"), presents this Brief in Opposition to the Petition for Writ of Certiorari by Dudley Luke Foussell ("Foussell"), C & F requests that this Court deny Foussell's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a maritime personal injury action brought by Plaintiff Dudley Foussell ("the plaintiff") against Defendants Parker Drilling Offshore USA, L.L.C. ("Parker") and C & F Offshore Services, Incorporated ("C & F"). The plaintiff pleaded causes of action against Parker for negligence under the Jones Act, 46 U.S.C. § 688 (Supp. 2001), and unseaworthiness of the vessel on which he was employed, as well as a claim for recovery of unpaid maintenance and cure. He asserted a general maritime negligence claim against C & F. Parker cross-claimed against C & F for indemnity with respect to its payments of maintenance and cure benefits to the plaintiff.

The case was tried to the court below without a jury. At the conclusion of trial, the district court dictated "preliminary" findings of fact and conclusions of law into the transcript [R. 8:212-282], which were later adopted

and supplemented in a written order [R. 4:696; App. R. E. Tab 2]. The court determined that the accident made the basis of this suit was caused by concurrent negligence of the plaintiff and an employee of C & F, Gary Reeves, and assessed the comparative fault at seventy-five percent to the plaintiff and twenty-five percent to Reeves. The court found that no negligence or vessel unseaworthiness for which Parker was responsible contributed to cause the plaintiff's injuries, but it further found that Parker was liable for certain unpaid maintenance and cure benefits.

Pursuant to its findings and conclusion, the court rendered a final judgment [R. 4:702; App. R. E. Tab 2] awarding plaintiff recovery of damages against C & F, reduced by seventy-five percent for his contributory fault. The judgment also awarded the plaintiff recovery of maintenance and cure benefits against Parker, and allowed Parker recovery of this sum over against C & F by way of indemnity.

The plaintiff appealed the district court's judgment in his favor in several particulars. The question presented by Foussell in his Petition for Writ of Certiorari was not addressed or raised in either of the lower courts herein.

Most of the facts as found by the district court pertaining to the occurrence of the subject accident are not in dispute and may be summarized as follows.

The plaintiff was employed by Parker as master of the M/V Margaret, a small supply vessel used for the ferrying of equipment and personnel from shore to Parker's offshore drilling rig. [R. 8:213] The Margaret was about thirty-five feet in length and carried no crew other than a master. At the time material to this case, the Parker rig,

known as Rig 23, was engaged in drilling a well in Matagorda Bay off the coast of Texas under contract to Meridian Resources Corporation ("Meridian"). Meridian hired C & F to provide dispatching services, *i.e.*, to arrange for and coordinate the delivery of supplies and cargo for loading onto the Margaret at a dock facility located at Port O'Connor, Texas. The C & F employee assigned to this particular job was Gary Reeves, who maintained an office in a trailer at the dock facility where he had telephone contact with the rig and radio contact with the Margaret. [R. 4:213]

The accident made the basis of this suit occurred on August 16, 1997. On the previous day the tool pusher on Rig 23, David Serrette, a Parker employee, requested the Meridian company man to arrange for delivery from shore of a joint of PVC pipe which he intended to use in the completion of certain shutdown operations on the rig. This request was relayed by the company man to Reeves, and Serrette requested the plaintiff to take the Margaret into the Meridian dock facility to take delivery of the pipe and bring it back to the rig. Sometime later that day, the Margaret reached the dock and tied up with its stern, and the PVC was delivered to the dock by truck. Reeves then assisted the plaintiff in handling the pipe, which was twenty feet in length with a diameter of about six inches and weighed an estimated one hundred pounds. The two of them removed the pipe from the truck and loaded it onto the Margaret. The plaintiff chose to store the pipe onboard by laying one end through a doorway leading from the main deck down into the boat's underdeck cabin, with the other end extending onto the rear top deck. The floor of the cabin was three steps down, or about thirty inches below the top deck. Because, as he said, he was concerned about

the pipe scratching the floor of the cabin, the plaintiff placed the end of the pipe extending into the cabin on top of a container, specifically a water cooler which was about eighteen inches tall and had a domed lid. The plaintiff placed the cooler on the topmost of two ten-inch high steps leading to the forward opening into the cabin, so that the length of the pipe within the cabin was suspended about thirty-eight to forty inches above the floor. The pipe was not in any way secured in this position but simply laid in place. [R. 8:214-222, 228, 232-236, 239-241]

Apparently additional deliveries were anticipated for the Margaret, so the plaintiff was advised by Reeves that he should keep the Margaret at dock until the following morning. Accordingly, the plaintiff spent the night in the cabin on the Margaret. By the next morning, the tool pusher on Rig 23 had evidently decided that he would not require the PVC pipe after all and had communicated this to Reeves. Contrary to the factual recitation in Plaintiff's Petition, Reeves went on to the Margaret and awakened the plaintiff, who came up on to the deck of the boat to talk to Reeves and learn that the pipe was not to be transported to the rig but was to be removed from the boat. It was understood that the two of them would handle the pipe in getting it off the boat in the manner that they had brought it aboard together the previous day. Reeves remained on the deck to grab the pipe from that end while the plaintiff went into the cabin to handle the other end. At this point, the plaintiff decided that he should be wearing his shoes when doing this work, and so he sat down on an adjacent bench and leaned in with his head and shoulders underneath the suspended length of pipe to put on his shoes. As he did this, Reeves pulled on his end of the pipe from the deck, with the result that the pipe

rolled off the top of the cooler and struck the plaintiff on the back of his neck, causing the injuries of which he complains in this action. [R. 8:226-235]

REASONS TO DENY THE WRIT

I. The Court's Finding of Fault Does Not Implicate the Jones Act

Foussell argues the Court's finding that Foussell/Petitioner was seventy-five percent contributorily at fault must be the result of the Trial Court's application of the "reasonable" negligence standard applicable to Jones Act cases in the United States Fifth Circuit Court of Appeals. The district court's finding that Foussell/Petitioner was seventy-five percent contributorily at fault and that C & F was twenty-five percent negligent does not, however, implicate the Jones Act. It is undisputed that C & F was never plaintiff's employer. The Jones Act has no application when determining liability in a non-employer/employee relationship. Even assuming Foussell/Petitioner is arguing that the Trial Court's zero percent negligence finding against Parker Offshore U.S.A. LLC is evidence of the court's invocation of the "more onerous ordinary standard" applicable in the Fifth Circuit, Foussell/Petitioner would be speculating, because there is no evidence and no finding that the Trial Court relied on this standard, or even considered it, when finding plaintiff's employer, Parker Drilling, zero percent negligent. The Trial Court's allocation of negligence therefore does not implicate the Jones Act or the negligence standard made the basis of Foussell/Petitioner's Petition for Writ of Certiorari.

II. The Court's Findings Do Not Implicate a Conflict between the Circuits

Foussell's desire to raise an issue of conflict between the Circuit Courts of Appeals is premised on speculation, and is wholly unsubstantiated. The alleged irreconcilable conflict between the United States Circuit Courts of Appeals regarding the degree of negligence prerequisite to a recovery by a seaman under the Jones Act is not raised by the facts or law of this case. Even assuming the degree of negligence necessary for a Jones Act liability finding is implicated by the Court's fact finding, there is no evidence or indication in any of the Trial Court's pronouncements or orders that its fault finding was premised on either a "featherweight" or "ordinary" degree of negligence. A conflict of the circuits, if any, is not implicated in this case.

III. No Conflict Between the Circuits

Neither case cited by Foussell/Petitioner as the basis for his Writ was reviewed by this Court. *Gautreaux v. Spurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (*en banc*); *William v. Long Island R.R. Co.*, 196 F.3d 402 (2d Cir. 1999). The Second Circuit's opinion conflicts with other opinions rendered by other panels of the same court. *See, Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52-53 & n.2 (2d Cir. 1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996). The Second Circuit has not reviewed the Jones Act negligence standard in an *en banc* decision. There is therefore no clear conflict between the circuits.

IV. Issue Not Previously Raised

The purported conflict between the circuits, or the standard of negligence applicable to Foussell/Petitioner's claims against C & F and Parker, were never raised, by pleading or otherwise, in the trial court or on appeal to the Fifth Circuit. A de novo review or discussion of this issue in this Court is therefore improper.

The facts and proceedings underlying this case neither give rise to a conflict between the circuits, nor make a review by this Court of an alleged conflict between the circuits appropriate at this time.

CONCLUSION

Foussell's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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